SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 789

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

Petitioner,

vs.

GORDON BROWNING ET AL., CONSTITUTING THE STATE BOARD OF EQUALIZATION OF TENNESSEE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS.

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PETITIONER'S REPLY TO BRIEF OF RESPONDENTS.

This reply brief is filed pursuant to Rule 38, paragraph 4 (a), of the Revised Rules, 306 U. S. 718.

I.

The Assessment Was Arbitrarily Made.

The brief filed herein by the State Board of Equalization, respondents, follows the course pursued by the assessors from the inception of the assessment proceeding of declining to give consideration to the evidence of value in the record or to discuss its weight and application.

Respondents' brief supports the basic contention of petitioner that the value for assessment was arrived at by

bringing forward a previous assessment, without regard to the evidence of present value. To sustain the valuation made by the assessors it refers *only* to previous assessments and to the rate of assessment per mile of other railroads in Tennessee.

One hundred and twenty-seven miles of road track have been abandoned since 1929 (R. 310-A), more than half of the agency stations discontinued (R. 239), and nearly two thousand equipment units, cars and engines retired (R. 234). In 1929, the period of the high assessment, a net railway operating income of $4,845,801 produced a net corporate income of $3,623,948, while in 1937 a net railway income of $840,290 produced a net corporate deficit of $471,623 (R. 306-A). The present assessment is 62.2 per cent of the 1929 assessment; the yield of the property in 1937 only 18 per cent of the yield in 1929. The evidence reviewed in the petition and supporting brief demonstrates that the loss of earning power and value is not temporary but permanent.

The reference in respondents' brief to assessments of other roads is taken from the argument of the spokesman of the Railroad and Public Utilities Commission before the State Board of Equalization, unsupported by evidence (R. 97). Respondents ignore the evidence of the large percentage of unprofitable branch mileage in petitioner's system; a condition not shown to exist in the other systems referred to and which renders the comparison wholly inapplicable. Petitioner's main line tracks, from Nashville to Atlanta, 323.22 miles, are valued for assessment at $37,200 per mile. (Assessment, R. 34, 38).

The general statement of the assessors that they had given consideration to enumerated elements or indicia of value, quoted on page 11 of respondents' brief, was made in the tentative assessment, dated August 22, 1938 (R. 37, 38). The comprehensive evidence of the value of the property was not filed by petitioner until on August 31, 1938 (R. 90).

and to that evidence the assessors' sole response was the reference to petitioner's ownership of tax-exempt securities and operating cash, and an assumed current increase in revenues of which there was no evidence (R. 92), quoted in full in the note at page 13 of the petition for certiorari.

Petitioner has not changed nor altered its position from that presented to the assessors in the first hearing, as noted on page 11 of respondents' brief, that the evidence on which the assessment is grounded contains no reliable or adequate proof of value except its earning capacity, based upon a fair capitalization of current earnings. We have never contended that the *statutes* of Tennessee limit the assessors to any kind or nature of evidence, but have consistently urged that the record of this assessment requires that valuation be primarily grounded on earning capacity or left to guesswork and conjecture. See page 18 of the petition for certiorari. Respondents have not pointed out any other evidence in the record upon which a fair valuation can be predicated.

Respondents, in their brief, make no denial of the averments of the petition for certiorari that:

1. The valuation placed by the assessors upon petitioner's railroad system ($23,996,604.14, R. 37) is grossly in excess of the value shown by any evidence in the record, nearly fifty per cent greater than the value shown by capitalization of the average income for a period of seven years, and five million dollars in excess of the value shown by a combination of the capitalization of income and market value of stock and bonds tests or measures of value, generally accepted by valuation authorities (Petition, p. 15).

2. That the valuation was made by the arbitrary addition of $750,247 per mile to the value of system distributable property fixed for the preceding biennium, in order that the

present assessment on a reduced mileage be made to exactly accord with the previous assessment (Petition, pp. 11-12).

3. That the assessors, and particularly the respondent Board, required by statute to make the assessment upon written evidence, arbitrarily added $909,855 to the value of localized property in Tennessee as shown by the tax return, with no other evidence of the value of such property in the record, and without even specifying the items or location of the property to which the increased value was ascribed (Petition, pp. 14-15).

4. That the State Board of Equalization, required by statute to finally fix the value for assessment, totally abrogated its statutory duty to review the evidence and fix the value, but approved the valuation made by the Railroad and Public Utilities Commission upon a mere assumption that the Commission had made a correct valuation (Petition, pp. 15-16).

5. That the Railroad and Public Utilities Commission arbitrarily disregarded and rejected uncontradicted evidence of the reduced value of the property to be assessed because of ownership of tax-exempt securities and operating cash, and an unsupported assumption of increase in current revenues (Petition pp. 12-13).

These several contentions of petitioner are established without substantial controversy on the record. An assessment so made denies the fundamental principle of the Constitution invoked by the petition.

The New Jersey railroad tax cases cited by respondents sustain the principles of constitutional law invoked by petitioner, but differ materially and substantially in the evidence and facts to which those principles were applied.

Central R. Co. of New Jersey v. *State Tax Department et al.*, 112 N. J. Law, 5, 169 A. 489; certiorari denied 293

U. S. 568 (October, 1934) presented only the issue of discrimination in taxation arising from alleged underassessment of property other than that of railroads. *No direct evidence of intentional and systematic underassessment was adduced*, and the indirect evidence offered by the railroads was held by the State court to be insufficient to support the claim. No issue of gross overvaluation arrived at by arbitrary methods was presented.

In *Central R. Co. of New Jersey* v. *Thayer Martin*, 114 N. J. Law 69, 175 A. 637, the railroad did not invoke the Federal Constitution, and no Federal issue was presented.

Lehigh Valley R. Co. of New Jersey et al. v. *Thayer Martin*, 19 F. Supp. 63; on appeal to the Circuit Court of Appeals, Third Circuit, 100 F. (2d) 139; certiorari denied (March, 1939) 306 U. S. 651, was dismissed by the Circuit Court of Appeals on the ground that the questions presented, involving the same assessment reviewed in 114 N. J. Law 69, were "res adjudicata and this defense as asserted by the appellees is valid." 100 F. (2d) 147. Denial of the writ of certiorari may properly be ascribed to that ruling.

Many substantial points of difference between the facts of the case cited and the case at bar are apparent from the opinion of the Circuit Court of Appeals. The court criticized the method of valuation employed by the assessors, based primarily upon an appraisal of the physical properties in New Jersey and disregarding system values except in slight degree (100 F. 2d 142-143), but noted that the terminal properties of the railroads in New Jersey were unusually extensive, and that the record failed to disclose excessive valuation. No claim of arbitrary conduct such as is here presented was noted in the opinion, and the Circuit Court of Appeals found against the contention of the railroads that the method of physical valuation applied to the property in question was not "reasonably intended to ascertain the actual or market value of the properties." (100 F. 2d 144.)

Central R. Co. of New Jersey v. *Martin*, 30 F. Supp. 41 (Advance Sheets), decided by the District Court for the District of New Jersey in November, 1939, sustains the contention of the railroads on the evidence then before it that the New Jersey method of valuation, expressly disapproved in the earlier cases, had produced excessive valuations condemned by the constitutional principles applied in *Great Northern Ry.* v. *Weeks*, 297 U. S. 135, and in *Rowley* v. *Chicago & N. W. Ry.*, 293 U. S. 102. After reviewing cases cited in the petition for certiorari herein, the District Court said:

> "These references are sufficient to convince the court that it is mandatory upon the taxing authorities to make the assessments unequivocally evince and reflect the earnings of the railroads. This does not mean that if there are no earnings there will be nothing to assess, but it does mean that the assessments should *evidence the influence of earnings or lack thereof.* (Italics by the Court.)
>
> "The decrease in earnings of these properties is not temporary, but has been due to a permanent loss of traffic as a result of changes in business and transportation methods. It must be remembered that these railroads were built to provide transportation before the perfection of the motortruck and the construction of the highway system. A large percentage of the traffic formerly carried solely by the railroads is now being transported by trucks, busses, etc. The rapid development of concrete state highways has resulted in the diversion to truck haulage of a vast tonnage of freight, including anthracite coal. Coal shipments have also declined because of the growing use of petroleum for fuel, which does not move by rail to any extent. The court is further moved to take notice of the loss of export traffic. Foreign nations have increased their custom duties on American products in reprisal for the increase in the tariff on imported goods with the result that their trade has gone elsewhere.

In order to reflect this deflation and diversion of business it is imperative that the earnings should permeate every item of railroad property, tangible, and intangible."

30 F. Supp. Advance Sheets 64.

The failure of respondents to make any effort to justify or support the assessment under review, by citation of evidence sustaining the valuation, is typical of the treatment of the controversy by the State and its assessors throughout the assessment proceeding, and clearly indicates awareness of failure to follow any legal or logical method of valuation complying with the constitutional requisite of due process of law, as shown by the petition for certiorari and record.

II.

Allocation of System Value to Tennessee.

Respondents have declined to respond to the evidence cited in the petition for certiorari as demonstrating error in the ruling of the State Supreme Court that the record fails to disclose that the portions of the railroad outside Tennessee are largely of greater value than the portion within the State, except to assert that "nearly all the expensive mountainous construction is located in Tennessee." (Brief, p. 21.)

The quoted statement is without support on the record and is made in apparent disregard of the uncontradicted proof that by actual appraisal of the Interstate Commerce Commission the investment cost of the road and fixed properties in Tennessee is only 64.11 per cent of the system investment, while the Tennessee road mileage, used as the sole basis of allocation, is 71.73 per cent of the system mileage (R. 310).

The brief shows that respondents applied what they considered a "general rule" of apportionment or allocation, while petitioner contends that due process of law requires the exercise of a sound judgment based on facts fairly reflecting the relation between value of the system as a whole and the part within the state. (Petition, pp. 19-23.)

The proof cited in the petition and supporting brief, and the finding by the assessors of variation in value between the several divisions and branches requiring a different method of allocation between the several counties and taxing districts of the State, demonstrates that a supposedly "general rule" was applied without the required exercise of judgment with respect to the facts in evidence, resulting in an arbitrary and excessive valuation for assessment in Tennessee.

III.

Equalization With Assessments of Other Property.

Respondents' brief (p. 23) states that the record contains direct evidence, admissions by tax assessors and county boards of equalization of intentional and systematic adoption and execution of a purpose to underassess property for taxation at an arbitrary percentage of actual value nowhere in excess of seventy-five per cent, from "less than one-third of the State's ninety-five counties."

The petition for certiorari and supporting brief show that the counties whose assessors admit adherence to the system of underassessment contain approximately ninety per cent of the petitioner's Tennessee road mileage (pages 28, 60-63). The average county tax rate is $2.22 on each one hundred dollars assessment, while the state tax rate is only eight cents (R. 301). The substantial discrimination complained of therefore is produced by the underassessment of other property in the counties wherein peti-

tioner's property is located and taxed. It is not so material whether the system of underassessment is applied in other counties, although the proof shows it to be uniformly followed throughout the state.

The petition and supporting brief state petitioner's contention that the proof in this record precludes any resort to a presumption, based on the statutory oath of tax assessors and equalizers, that the State Board of Equalization increased the assessments of other property to the level of actual value (pages 30, 57-64).

Respondents insist that the State Board of Equalization is vested with power to increase assessments made by local assessors, without the sworn and specific complaint of underassessment required by section 1450 of the Code of Tennessee, quoted at page 66 of the appendix to the petition for certiorari. They ignore the declaration of section 1433 of the Code of Tennessee that the action by the county board "shall be final, except in so far as the same may be revised or changed by the state board of equalization" (Appendix to Petition, p. 65). And respondents do not controvert the statement of the petition (p. 29) that no such increase in assessment is permitted by the statute (Code, 1453; App. 66) without personal service on the property owner of notice to appear and show cause why his assessment should not be increased. The universality of the underassessments shown in the proof reduces to absurdity a presumption that a board composed of the principal political officers of the State, ex officio, served such notices upon all the property owners of the thirty-one counties here involved, and corrected the underassessments purposely made by local assessors.

The State Supreme Court indulged no such presumption. It merely presumed that, to the extent its jurisdiction was invoked, the State Board made its equalizations at actual value, and therefore had no part in the underassessment of

property generally; upon which presumption the cou
ruled that petitioner must fail in its claim to relief becaus
it had not shown a fraudulent purpose on the part of th
State Board. This is the true meaning of the excerpt fro
the opinion quoted on the respondents' brief at pages 22-2
This ruling is shown to be erroneous by the decision o
this Court in *Greene v. Louisville and Indiana R. Co.*, 24
U. S. 499, 518, quoted in the petition for certiorari at page
30-31. The error of the State Board, of which the petitio
complains is that, approving an assessment of petitioner'
property at a value equal to or exceeding actual cash valu
it arbitrarily rejected and refused to give effect to uncon
tradicted proof of the intentional and systematic underas
sessment of other property, so that, as held in the cas
above cited, "the whole assessment, considered as on
judgment" is a fraud upon the petitioner's property.

Section 1469 of the Code of Tennessee provides; "Min
utes of each day's session of the board (the state board
of equalization) shall be kept and signed by its members
such records to be preserved in the office of the departmen
of finance and taxation." The minutes so kept and pre
served are public records. They show every official actio
of the Board, and no controversy with respect to their rec
tations is possible. The important constitutional right
herein asserted should not be disposed of on presumptio
of the contents of an official record so available. If th
facts with respect to action by the State Board are by th
Court deemed material, petitioner respectfully asks per
mission to file, and refer to, a certified copy of the minute
of the Board containing its record of the 1937-1938 assess
ment. Such minutes, made by respondents, were known
to them when they denied petitioner's claim for equaliza
tion without claiming for themselves that the assessment
to which petitioner's proof referred had been reviewed by
them and raised to the level of actual value.

As precedent for the request that the Court permit reference to the official record of respondents, petitioner cites *Norris* v. *Alabama*, 294 U. S. 587, 593, wherein this Court permitted the production of a jury roll, a public record of the State of Alabama, upon the argument, and examined it in aid of evidence that a constitutional right had been wrongfully denied.

In none of the cases cited on the brief of respondents, in which judicial relief was denied, did the evidence contain uncontradicted admissions by assessors, to the extent shown herein, that they had intentionally and systematically departed from the statutory measure of assessment and had substituted an arbitrary percentage of value, substantially less than actual value, at which they had assessed all property within their jurisdiction. Therefore none of the cases cited supports the position of respondents. Particularly is this true of the New Jersey cases, considered hereinabove, the evidence in which contained no such direct evidence of systematic and long-continued departure from constitutional principles of uniformity in taxation.

Petitioner respectfully submits that the fraud on petitioner's fully assessed property, shown by the admissions of the assessors of other property subject to the same tax, permeates the entire assessment and requires proof of its eradication and correction rather than a judicial presumption, untrue in fact and unreasonable from every practical consideration. The testimony of the local assessors herein demonstrates that the penal statutes cited by respondents have proven ineffective to force local assessments at actual value, and that constitutional equality in taxation in Tennessee can be accomplished only by the decision of this

Court that the discriminatory assessment of petitioner's property cannot be enforced.

Respectfully submitted,

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